UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LISA C. NEAL,

Plaintiff,

v.

CITY OF BAINBRIDGE ISLAND,

Defendant.

CASE NO. 3:20-cv-06025-DGE

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

This matter comes before the Court on Defendant City of Bainbridge Island's ("the City") motion to dismiss, or in the alternative, to bifurcate Plaintiff Lisa Neal's Public Records Act ("PRA") claims. (Dkt. No. 10.) Plaintiff opposes Defendant's motion. (Dkt. No. 18).

Having considered Defendants' motions, Plaintiff's Response, Defendants' Replies, the exhibits and declarations attached thereto, and the remainder of the record, the Court DENIES Defendant's motion to dismiss without prejudice to Defendant raising similar substantive arguments in a motion for summary judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises from events surrounding the City Council of Bainbridge Island's vote to remove Plaintiff from her position as a citizen volunteer member of the Island Center Subarea Planning Process Steering Committee ("the Committee") in August 2018.

The Committee was established by the City Council in 2017 primarily to "commence the subarea planning process for a designated center or neighborhood" and was to consist of up to nine members representing a "wide spectrum of interests and expertise." (Dkt. Nos. 3 at 3; 10 at 1; 10-1 at 15-16.) The Council appointed Plaintiff to the Committee in late 2017, and she served on the Committee until her removal on August 14, 2018. (Dkt. Nos. 3 at 3; 10 at 1.) Plaintiff alleges that in voting to remove her from the Committee, the City Council publicly humiliated and defamed her, and sought to chill her speech and prevent her from serving on City land use committees because she raised concerns related to the City's Comprehensive Plan and several Committee members' potential conflicts of interest. (Dkt. Nos. 3 at 1-32; 18 at 24.)

Plaintiff brings several claims against the City based on these events, including: 1) Violation of the First Amendment pursuant to 42 U.S.C. § 1983, 2) Defamation, 3) Intentional and/or Negligent Infliction of Emotional Distress, 4) Violation of Revised Code of Washington 42.56 (the Public Records Act), and 5) Violation of Revised Code of Washington 4.24.510. (Dkt. No. 3 at 31-34).

II. STANDARD OF REVIEW

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure can be granted only if the complaint, with all factual allegations accepted as true, fails to "raise a right to relief above the speculative level." *Bell Atl.*

Corp. v. Twombly, 550 U.S. 544, 555 (2007). Mere conclusory statements in a complaint and "formulaic recitation[s] of the elements of a cause of action" are not sufficient. *Id.* "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988) (citation omitted).

When ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court accepts all facts alleged in the complaint as true and makes all inferences in the light most favorable to the non-moving party. *Baker v. Riverside Cty. Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009). However, the court is not required to accept as true a "legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* at 678. This requirement is met when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The complaint need not include detailed allegations, but it must have "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007). Absent facial plausibility, a plaintiff's claims must be dismissed. *Id.* at 570.

Generally, a district court may not consider material beyond the complaint in ruling on a Rule 12(b)(6) motion to dismiss. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). However, there are limited exceptions to this rule: (1) a court may consider material properly submitted as a part of the complaint; (2) a court may consider documents not physically attached to the pleading if the contents are alleged in the complaint and no party questions the authenticity; and (3) under Federal Rule of Evidence 201, a court may take judicial notice of

matters of public record. *Id.* at 688–89.

III. DISCUSSION

A. Proper Service

Defendant argues that Plaintiff's complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(4) for insufficient service. (Dkt. Nos 10 at 3-4; 21 at 2-3.) Defendant cites Federal Rule of Civil Procedure 4(m), which provides that if a Defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. (*Id.*); Fed. R. Civ. P. 4(m).

Here, Plaintiff filed her complaint with this Court on October 16, 2020, and filed a First Amended complaint on January 14, 2021, 90 days later. (Dkt. Nos. 1 and 3.) Defendant contends that Plaintiff unilaterally filed her amended complaint without serving the City with her original complaint, and was therefore not permitted to amend her complaint as a matter of course pursuant to FRCP 15. (Dkt. Nos. 10 at 3-4; 21 at 2-3.)

Plaintiff contends that she sent a draft of her complaint to the City Council in May 2020, and filed a Tort Claim Notice on August 13, 2020, but received no response to either. (Dkt. Nos. 18 at 4; 20 at 2.) Plaintiff further contends that she forwarded a demand letter that included a request for a tolling agreement to the City to explore non-monetary settlement options in October 2020, and that she filed her original complaint when the City refused to agree to toll the statute of limitations on her claims. (Dkt. No. 20 at 2.)

Defendant accepted service of Plaintiff's amended complaint on January 14, 2021. (Dkt. Nos. 19 at 2-3; 19-4 at 2.) This was the 90th day after the original complaint was filed. Defendant argues that while they were aware of Plaintiff's claims, Plaintiff cannot invoke the

jurisdiction of this Court absent proper service, and that Plaintiff has not established "good cause" for failing to properly effect service on Defendant. (Dkt. No. 21 at 2-3)

An amended complaint supersedes the original complaint. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). The original complaint is "treated thereafter as non-existent." *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967), *overruled on other grounds by Lacey v. Maricopa Cty.*, 693 F.3d 896 (9th Cir. 2012). Courts in the Ninth Circuit have found that an amended complaint supersedes the original complaint when the amended complaint is properly served. *Doe v. Unocal Corp*., 27 F. Supp. 2d 1174, 1180 (C.D. Cal. 1998). Because Plaintiff amended the complaint before it was served and because it was served within 90 days after the original complaint was filed, service of only the amended complaint was proper.

Accordingly, Plaintiff's amended complaint, which has been served, supersedes her original complaint, and the Court will consider the amended complaint when assessing Defendant's Rule 12(b)(6) motion.

B. Motion to Amend Complaint

In her response to Defendant's Rule 12(b)(6) motion, Plaintiff asks for leave to amend her First Amended Complaint, arguing that the facts alleged, and the full hearing of the City Council meeting of August 14, 2018, support a claim under the Equal Protection Clause of the Fourteenth Amendment pursuant to 42 U.S.C. § 1983 and a claim for conspiracy to deprive Plaintiff of her constitutional rights. (Dkt. No. 18 at 8, 25.) Plaintiff further asks to amend her complaint to add additional facts concerning whether she was a city employee. (Dkt. No. 18 at 2-3.) Defendant opposes Plaintiff's motion. (Dkt. No. 21 at 13.)

Pursuant to Federal Rule of Civil Procedure 15(a), after an initial 21 day period for amendment as of right, pleadings may be amended only with the opposing party's written consent or by leave of the court. Fed. R. Civ. P. 15(a)(2).

"Courts are free to grant a party leave to amend whenever 'justice so requires,' Fed. R. Civ. P. 15(a)(2), and request for leave should be granted with 'extreme liberty.'" *Moss v. U.S. Secret Service*, 572 F.3d 962, 972 (9th Cir. 2009) quoting *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001). In addition, "Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." *Polich v. Burlington Northern, Inc.*, 942 F.2d 1467, 1472 (9th Cir. 1991); *see also Moss v. U.S. Secret Service*, 572 F.3d at 972; *Gompper v. VISX, Inc.*, 298 F.3d 893, 898 (9th Cir. 2002).

The Court must consider five factors when considering whether to grant a plaintiff leave to amend: 1) bad faith, 2) undue delay, 3) prejudice to the opposing party, 4) futility of amendment, and 5) whether the plaintiff has previously amended the complaint. *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1154 (9th Cir. 2014), citing *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004).

Here, there is no evidence of bad faith. Plaintiff has only amended her complaint once, and there is no evidence that permitting her to amend her complaint to add new theories and facts in support of her claims would cause undue delay or prejudice to Defendant.

Defendant contends that granting Plaintiff leave to amend her complaint to include additional facts would be futile, since Defendant does not dispute Plaintiff's statement that she was never a City employee. (Dkt. No. 21 at 13.) Defendant further contends that amendment would be futile in this case because Plaintiff's equal protection and derivative conspiracy claims

lack a legal basis. (*Id.*), citing *Lockheed Martin Corp. v. Network Sol., Inc*., 194 F.3d 980, 986 (9th Cir.1999) ("Where the legal basis for a cause of action is tenuous, futility supports the refusal to grant leave to amend.") (internal citations omitted).

While Plaintiff does not precisely describe the basis of her equal protection claim, she cites Supreme Court precedent establishing that an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class based discrimination, but instead claims that she has been irrationally singled out as a so-called "class of one." (Dkt. No. 18 at 25), citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). For a plaintiff to prove such a claim, they must demonstrate the government: "(1) intentionally (2) treated [the plaintiff] differently than other similarly situated [persons], (3) without a rational basis." *Gerhart v. Lake Cnty., Mont*., 367 F.3d 1013, 1022 (9th Cir. 2011).

Plaintiff also cites case law from other jurisdictions providing grounds for relief in equal protection claims brought pursuant to 42 U.S.C. § 1983. (Dkt. No. 18 at 25), citing *Esmail v. Macrane*, 53 F.3d 176, 178 (7th Cir. 1995) (holding that to state a claim for relief under the Equal Protection Clause of the Fourteenth Amendment pursuant to 42 U.S.C. § 1983 a plaintiff must allege that action taken by the state, whether in the form of prosecution or otherwise, was a spiteful effort to "get" him for reasons wholly unrelated to any legitimate state objective); *Rubinovitz v. Rogato*, 60 F.3d 906, 912 (1st Cir. 1995) (holding that in the absence of invidious discrimination or the abuse of a fundamental right, a party may establish an equal protection violation with evidence of bad faith or malicious intent to injure).

Here, the essence of Plaintiff's claim is that the City Council publicly humiliated and defamed her, and sought to chill her speech and prevent her from serving on City land use committees because she raised concerns related to the City's Comprehensive Plan and several

Committee members' potential conflicts of interest. (Dkt. No. 3 at 1-32.) In support of her claims, Plaintiff cites allegedly defamatory statements concerning her behavior made by City council members and other City officials. (*Id.*)

As such, Plaintiff has set forth additional facts and a cognizable legal theory to support her equal protection claim, and amendment would not be futile for purpose of defendant's 12(b)(6) motion. *See Miller v. Rykoff–Sexton, Inc*., 845 F.2d 209, 214 (9th Cir. 1998*), overruled on other grounds by Ashcroft v. Iqubal*, 556 U.S. 662 (2009) (explaining that a proposed amendment is futile only if "no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense.")

Accordingly, Plaintiff is granted leave to amend her complaint to include the new theory and additional facts provided in her opposition.

C. Conversion to Rule 56 Motion

Plaintiff asks this Court to treat Defendant's Rule 12(b)(6) motion as a motion for summary judgment under Rule 56. (Dkt. No. 19 at 3.)

The Court notes that a motion to dismiss made under Federal Rule of Civil Procedure 12(b)(6) must be treated as a motion for summary judgment under Federal Rule of Civil Procedure 56 if either party to the motion to dismiss submits materials outside the pleadings in support or opposition to the motion, and if the district court relies on those materials. Fed. R. Civ. P. 12(d); *Jackson v. Southern California Gas Co*., 881 F.2d 638, 643 n. 4 (9th Cir. 1989) ("The proper inquiry is whether the court relied on the extraneous matter.").

Failure to treat the motion as one for summary judgment can constitute reversible error. *See Bonilla v. Oakland Scavenger Co*., 697 F.2d 1297, 1301 (9th Cir. 1982); *Costen v. Pauline's Sportswear, Inc*., 391 F.2d 81, 84-85 (9th Cir. 1968). A party that has been notified that the

court is considering material beyond the pleadings has received effective notice of the conversion to summary judgment. *See Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1533 (9th Cir. 1985), cert. denied, 474 U.S. 826 (1985); *Townsend v. Columbia Operations*, 667 F.2d 844, 849 (1982). Moreover, the fact that the court has before it exhibits outside the pleadings can constitute constructive notice. *See Grove*, 753 F.2d at 1533 (holding that notice is given "when a party has reason to know that the court will consider matters outside the pleadings").

The extrinsic evidence in this case consists of emails between the parties, video excerpts of City council meetings, and transcripts of these meetings prepared by the parties. (Dkt. Nos. 11; 16-1 at 1-4; 18-1 at 1; 18-2 at 1; 18-3 at 1; 18-4 at 1-3; 19-1 at 1-5; 19-2 at 1-8; 19-3 at 1-6; 19-4 at 2-3; 19-5 at 2-3.)

A court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment. But a court "cannot take judicial notice of disputed facts contained in such public records." *Khoja v. Orexigen Therapeutics, Inc*., 899 F.3d 988, 999 (9th Cir. 2018) (internal citations omitted). Federal Rule of Evidence 201 provides, in pertinent part, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

While much of the extrinsic evidence in this case consists of public records of which the Court could take judicial notice, the evidence also contains excerpts of party communications and recorded hearings, along with transcripts of meetings submitted by the parties. The Ninth Circuit has cautioned that "the unscrupulous use of extrinsic documents to resolve competing theories against the complaint risks premature dismissals of plausible claims that may turn out to be valid after discovery." *Khoja*, 899 F.3d at 998–99 ("If defendants are permitted to present

their own version of the facts at the pleading stage—and district courts accept those facts as uncontroverted and true—it becomes near impossible for even the most aggrieved plaintiff to demonstrate a sufficiently 'plausible' claim for relief."). Because the records at issue here are incomplete, their contents are open to dispute, and the Court declines to take judicial notice of them.

Because both parties submitted materials outside of the pleadings, and may submit additional evidence following discovery, the issues raised in the present motion should be decided on summary judgment after the parties have had an opportunity to fully develop the record. Fed. R. Civ. P. 12(d) ("All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.") The Court notes that Plaintiff contends that additional discovery "is anticipated to reveal different treatment for the Island Center recordings, than for other committees" (Dkt. No. 19 at 2-3), and further notes that on May 25, 2021, the Court issued a protective order staying discovery pending its ruling on Defendant's Rule 12(b)(6) motion. (Dkt. No. 25.)

As such, the Court denies Plaintiff's request to convert Defendant's Rule 12(b)(6) motion into a motion for summary judgment at this stage. While doing so would permit the Court to evaluate the parties' claims and defenses more efficiently, it would also encourage Defendants to file Rule 12(b)(6) motions, disguised as motions for summary judgment, at early stages of litigation. *See e.g., Hartman v. Canyon County*, Case No. 1:20-cv-00026-CWD, 2021 WL 4847426, n.1 (D. Idaho, Oct. 18. 2021) (cautioning against filing "disguised Rule 56 motions" at early stages of litigation); *Jordan v. Wonderful Citrus Packing LLC*, Case No. 1:18-cv-00401-AWI-SAB, 2019 WL 4139269, at *2 (E.D. Cal. Aug. 30, 2019) (cautioning against filing motions for summary judgment disguised as "trial management" motions); *Valdez v. Adler*, Case

No. 1:10-cv-00772-JLT HC, 2010 WL 4814076, n. 3 (E.D. Cal. Nov. 19, 2010) (cautioning counsel against filing a merits answer disguised as a motion to dismiss.)

The Court finds it more appropriate to deny Defendant's Motion to Dismiss without prejudice to Defendants raising their arguments in a Motion for Summary Judgment filed after Plaintiff has amended her complaint and the parties have completed discovery. The Court further finds it appropriate to lift its protective order staying discovery (Dkt. No. 25) so the parties can conduct additional discovery and submit material relevant to a Motion for Summary Judgment.

IV. ORDER

Having considered Defendants' motion, Plaintiff's Response, Defendants' Replies, the exhibits and declarations attached thereto, and the remainder of the record, the Court finds and ORDERS:

(1) Defendant's motion to dismiss or in the alternative, to bifurcate Plaintiff's claim (Dkt. No. 10) is DENIED without prejudice to Defendant raising similar substantive claims in a motion for summary judgment following discovery.

(2) The Court's protective order staying discovery pending its ruling on the motion to dismiss (Dkt. No. 25) is LIFTED and Defendant shall have thirty days to respond to Plaintiff's first set of interrogatories and requests for production.

(3) Plaintiff shall file a second amended complaint consistent that includes the additional facts and theory contained in her opposition to Defendant's 12(b)(6) motion no later than January 24, 2022. If the second amended complaint is not filed by such date, the Court may, upon motion, enter an order dismissing the present matter.

Dated this 29th day of December, 2021.

David G. Estudillo
United States District Judge